



Be ready for B Day: pensions deadline on 5 April 2011

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Importance ★★★★★

5 April 2011

This is a key deadline for nearly all occupational pension schemes. If you are a trustee or an employer, please read this briefing.

A key five year period of grace that began on 6 April 2006 (A Day) expires on 5 April 2011. You should check that you have taken advantage of it as far as you need to.

Special concessions making it easier to amend schemes in line with the new tax rules that came in on A Day run out next April. If you miss out on them, you might not be able to amend your scheme in ways you would like to. Some amendments might be impossible and others might have to be restricted to future accrual.

We are calling the expiry date "B Day".

The transitional concessions help with three changes.

- **Keeping pre-A Day HMRC benefit limits in place** in schemes that want some or all of them to apply indefinitely.

For now, the transitional measures keep the old limits in place. But they will fall away on B Day unless they are expressly re-incorporated into the scheme rules.

Many schemes we advise have dealt with this already by doing an amending "A Day deed". You should check where your scheme stands.

- **Removing restrictions on scheme alteration powers that require HMRC approval.**

Before A Day, amending a scheme without HMRC (i.e. Inland Revenue) approval put its tax exemptions at risk. Some schemes incorporated this requirement as a restriction on their alteration power. But, since A Day, approval is neither required nor possible. This led to a concern that a restriction that could no longer be satisfied would render all future amendments invalid. There is also a question whether an alteration power can be used to amend itself.

Recent regulations allow schemes to remove this restriction before B Day. You should check whether your amendment power has the restriction.

- **Preserving an existing power to refund surplus** to the employer.

A refund might seem a remote possibility today, but times can change. This is not about making a refund. The question is only whether a power to pay a refund in future should continue to exist.

To help schemes that might otherwise have lost their power to refund surplus, the Pensions Act 2004 included a transitional power of alteration. But the way it was drafted means that the trustees of nearly all schemes with power to make a refund now need to pass a carefully worded resolution if the power is to remain alive. This includes schemes that are winding up.

Since the issue is returning surplus, it is for the employer to take the initiative and make the case to the trustees for passing a resolution. The employer will often be able to argue that a resolution would benefit all parties by making points like these:

- a resolution does not mean there will be a refund, just that the existing possibility of one remains open;
- tough statutory conditions must be met before any surplus can be refunded (e.g. in an ongoing scheme, trustee consent is required and the scheme must be funded to buy-out level);
- without the possibility of a refund, the employer might take a tougher line in funding negotiations for fear of trapped surplus and might be less inclined to keep the scheme going in future; and
- the employer's ability to benefit from surplus can have an impact on its accounts.

The trustees should take an independent view whether to agree to the employer's proposal. They must be satisfied that a resolution would be in members' interests.

You should allow plenty of time. Trustees must give members 3 months' notice of their intention pass a resolution, so the employer should start the exercise well before the end of 2010.

The intention was that schemes with onerous conditions on their refund powers drawn from the pre-A Day legislation (e.g. HMRC's old definition of surplus) should be able to shed them now the legislation has been repealed. But the legislation has been drafted to catch more schemes than strictly necessary.

For more information please get in touch with your usual contact in the pensions team or with Marcus Hellyer at marcus.hellyer@burgess-salmon.com or on 0117 902 7789.

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